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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 619

ARTHUR L. HARRIS, SR., ARTHUR L. HARRIS, JR., ELMER F. LEA and CHARLES W. MARSHALL,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI.

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We take issue with the Government's position (p. 17) that the case is one of gross fraud amply proved. We insist the case on the evidence is a close one; that the—now for the first time—conceded error in keeping relevant evidence from the defendants, could have, in the minds of the jury, tipped the closely balanced scales and led to acquittals.

We do not intend in this, what can only be a short memorandum, to closely or exhaustively analyze the facts. In the briefs in the court below such analyses took up a major portion of the space. We do feel, however, that at least a few errors and misleading statements in the Government's brief should be pointed out.[1]

[1]The briefness of these comments is not to be taken as acquiescence in the Government's view of the facts not mentioned.

Thus, for example, the Government states (p. 11): "No refunds were forthcoming." This is clearly incorrect. No less than 72 pages of the transcript [R. T. 7781-7853] is devoted to the introduction of evidence showing that many, many refunds were made to persons who asked for same and that some 189 exhibits [ZZ204-ZZ393] were introduced showing refunds that were made.

Again, the Government states (p. 5) that the printed literature had received the approval of either Harris, Sr., or his son. It neglects to state that no printed literature was distributed which did not have the prior approval of the California Division of Real Estate and that in every instance where a change was suggested by that agency, the change was made [R. T. 7659-7661].

The Government suggests (p. 21) that the real issue in the case was not whether representations were made, but whether they were justified. Yet in Government counsel's argument to the jury[2] he said, after more than 2½ hours of argument: "at last we have a representation that has not been denied by any of the defendants" [R. T. 8967, lines 4-6].

The Government claims (p. 7) that the so-called "protection letters" were evidence of bad faith, yet it does not suggest, for it cannot, that the defendants ever violated their agreements in those letters and ever sold lots to persons for lil e businesses. Rather than being evidence of bad faith, this fact is evidence of good faith.

The Government says (pp. 11-12) that some investors testified that they had not read the clause "on the back of the contract" which clearly stated that there was no

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[2]Not reproduced in the record.

agreement by seller to rent or resell the property. Yet, aside from a statement that the contract was to be performed in Los Angeles, that clause was the *only* contractual clause on the back of the contract and it was on the back of the contract that the parties signed. Prior to the executory clause of the contract, on the back thereof, there are only two short sentences. In order for a person not to see the clause in question and still sign the contract, he would consciously and literally have to close his eyes. Had defendants been permitted to show discrepancies between what these witnesses had said on the stand and what they had said before, it is abundantly clear that the jury would have looked with a different eye at such testimony.

ARGUMENT.

This is the first time in these entire proceedings that the Government has conceded (p. 16) the trial court erred in not permitting defense counsel to see the statements. Had it done so in the court below, there is no way of telling what view that court might have taken. And clearly, had it done so in the trial court, the case would have taken on an entirely different color. Certainly the trial court would have ruled differently.

The Government's argument in this case is clever, but this cannot obfuscate the issue. In the other Jencks type cases now pending on certiorari before this Court the Government argued that there was no error *and*, in most, that the error was harmless (Briefs in opposition: Nos. 435, 436, 437, p. 2; No. 451, p. 10; Nos. 489, 491, p. 2). Its concession in this case, now for the first time, that error was committed—its abandonment of the first ground of opposition to certiorari in the other cases in this Court as to which certiorari was granted—cannot improve its posi-

tion. In the other cases—*Rosenberg*, No. 451, for example—the doctrine of harmless error did not deter this Court from granting review. No more should it deter the Court in this case. As in *Rosenberg*, the doctrine of harmless error is equally inapplicable here. Moreover, the Government's concession is only as to the *Jencks* rule and 18 U. S. C. 3500. The Government says nothing about petitioners' point that certiorari should be granted to clarify the present status of *Goldman v. United States*, 316 U. S. 129.

This is not a case wherein the Court will be put to the question as to whether "never, under any circumstances, may the failure to produce as to any witness, no matter how inconsequential, be deemed non-prejudicial" (Govt. Br. 19). Not even the court below viewed the case as such (Pet., Appx. B, p. 11). The witnesses in this case as to whom production was not allowed were substantial and the Government relied heavily on their testimony (see Pet., p. 5).

We do not think, in fairness to defendants, that a hearing should be denied them based on the number of times their counsel sought production. The trial court had made its erroneous rulings twice. This was sufficient to protect the record. Just as in the other cases tried before *Jencks* which have been reversed, these defendants too are entitled to the benefit of that rule.

As to petitioners' suggestion that this case be permitted to be argued at the same time as the other *Jencks* type cases now before the Court, we add this:

We are advised that the cases referred to in footnote 25, page 19, of the petition[3] are tentatively set for argument in April, 1959. We are also advised that this Court will return to session on February 24.

Should the Court grant certiorari herein on February 24, petitioners intend to waive the filing of an opening brief and will rely upon the petition. This would permit the Solicitor General to file the Government's Brief on or before March 26, 1959.[4]

With respect to the printing of the record, the major portion thereof consists of 9,200 pages of reporter's transcript. This was prepared by the Ozalide process and the Court reporters advise that additional copies can be prepared within two weeks though they would prefer three. Because the record is so large, the expense of printing so great, and the Ozalide duplication so clear, we would ask leave that printing not be required but that 10 copies of the reporter's transcript be permitted to be filed. As to the clerk's transcript, consisting of 329 pages, we would cause that to be printed, or, in order that the pagination not be changed, could file 10 typewritten copies thereof.

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[3] *Lev v. United States*, No. 435; *Wool v. United States*, No. 436; *Rubin v. United States*, No. 437; *Rosenberg v. United States*, No. 451; *Palermo v. United States*, No. 471; *Scales v. United States*, No. 488; *Pittsburgh Plate Glass Co. v. United States*, No. 489; *Galax Mirror Co., Inc. v. United States*, No. 491.

[4] In the petition for writ of certiorari, we said (p. 22):

> "Should this Court grant certiorari here, counsel for petitioners in this case could arrange for a prompt duplication of the record, and could file their opening brief within two weeks after the grant of certiorari, so that the instant case could be ready for argument in March or April when the similar cases will be argued."

The Solicitor General now has a copy of the record and so there need be no delay on his part to await the filing of the additional copies with the Clerk of this Court.

We repeat the statement made in the petition, pages 22 and 23:

> "In determining the scope of the numerous facets of the *Jencks* rule, this Court should have before it a case in which the former statement of a key witness was used by the witness, just prior to her taking the witness stand, to refresh her recollection—but the defense was not allowed to see the statement. This is such a case. That question appears in none of the cases to be heard by the Court. It is an issue that calls for determination by this Court in the context of the Court's comprehensive review of the import of the rationale of *Jencks*.

Respectfully submitted,

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